United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7390

ORIGINAL

To be argued by:
Michael C. Devine

In The

United States Court of Appeals

For The Second Circuit

B P/S

NORI SINOTO,

Appellant,

vs.

DEVCO MANAGEMENT, INC. and
LEIGHTON O. EDWARDS, JR.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLANT

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I. Did defendants sustain their burden of proof as to any defense to the Notes?

II. Whether the district court erred in accepting testimony of an alleged parol agreement contrary to the terms of the written agreement.

III. Whether the Notes were supported by consideration.

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STATEMENT OF THE CASE

A. Nature of the Case and Facts.

Plaintiff, Nori Sinoto, is a citizen of

Japan, currently residing in New York County (13a).*

Defendant Devco Management, Inc. ("Devco") is a Delaware corporation, having its principal office in New York County (13a). Defendant Deighton O. Edwards, Jr. is a United States citizen, at all relevant times a resident of New York State (13a).

Devco was organized formally in March, 1972, by defendant Edwards, who became its majority shareholder and chief executive officer (57a). It was started as a minority group or black-owned company in the business of waste management (35a).

Plaintiff conceived Devco's business, and prior to its formation he advised Edwards regarding its organization and development (33a-37a). In consideration for his contributions to the business, it was agreed that plaintiff would own 50% of Devco (39a, 51a-53a).

As of April, 1972, Edwards had not performed this agreement, and therefore plaintiff demanded of the company, and of Edwards, alternative compensation for his services (46a-51a). Edwards thereupon signed

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* References to the Appendix are denoted simply by the Appendix page number. In the Appendix certain pages from the trial transcript bear handwritten notations. These were made by plaintiff. They are unofficial and were not before the district court. Appellant requests that they be disregarded and apologizes for the oversight.

and delivered to plaintiff six documents: four promissory notes totalling $50,000 ("Notes") (129a-136a), a letter reciting the existence of consideration (137a), and a personal financial statement showing his ability to pay the Notes (138a).

The Notes were not paid on their maturity dates, and thus on September 13, 1972, plaintiff made formal presentation (13a). Payment was refused, and no payment was made thereafter (13a-14a).

Based upon the district court's diversity of citizenship jurisdiction, plaintiff here sues on the Notes. Defendants offered two defenses*: lack of consideration, and invalidity because the Notes were "procured by fraud" (the allegation was that the Notes were not to be presented or negotiated and that they were completed after signature) (10a-11a, 14a-15a).**

B. Course of Proceedings.

The action was tried without a jury in the Southern District of New York in March, 1974. After

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* Originally three defenses were pleaded. However, the first, a jurisdictional defense, was abandoned (12a).

** Defendants also pleaded a so-called "set-off", which it never attempted to prove (11a).

trial the district found that there was consideration for the Notes and that the Notes were completed prior to signature (128a-140a). However, it found that the Notes were not notes "in any conventional sense" and dismissed the complaint (141a).

Plaintiff thereupon appealed to the United States Court of Appeals for the Second Circuit from the dismissal order and judgment dismissing his complaint (143a). The Court of Appeals remanded the action to the district court for additional findings of fact and conclusions of law (144a).

On May 2, 1975, the district court rendered a supplemental opinion, adhering to its earlier decision in favor of defendants, but altering the findings of fact and conclusions of law upon which the decision was based. It found that the Notes "were not intended to impose financial obligations" -- a ruling seemingly similar to its earlier finding that the Notes were not notes "in any conventional sense". It also found that the Notes lacked consideration -- a ruling diametrically opposed to its earlier finding (145a-148a).

Plaintiff appeals from the dismissal order based upon the supplemental opinion and the judgment dismissing his complaint (149a-150a).

C. Summary of argument.

Plaintiff's prima facie case for enforcement of the Notes was proved.

No defense was proved. The district court admitted that it could not determine the true genesis of the Notes from the testimony presented at trial. Absent a finding of genesis the district court could not conclude that the Notes "were not intended to impose financial obligations" for that conclusion is defensive in nature and defendants thus bore the burden of proof.

In addition, based on Exhibit 5 and supporting testimony, the district court's first conclusion (that consideration existed) was correct, and its second conclusion (that consideration was wanting) was incorrect.

POINT I

DEFENDANTS FAILED TO PROVE ANY DEFENSE TO THE NOTES

The Notes and the letter which accompanied them are complete on their face. They are standard in form and fully executed. The Notes were presented but not paid.

There is no dispute about any of this. Plaintiff's prima facie case was proved.

The issue at trial was whether defendants could

establish any defense to the Notes. They asserted two:

(a) lack of consideration;

(b) invalidity due to fraud, allegedly because the Notes were completed after signature and were not to be negotiated or presented (10a-11a, 14a-15a).

The lack of consideration defense and the allegation that the Notes were completed after signature were wholly baseless. The district court rejected them out-of-hand*, although on reconsideration, after the first appeal, the district court reversed field and found a want of consideration. Defendants also failed to prove any fraud defense based upon a non-presentation or non-negotiation understanding.

However, the district court found that the Notes were void because they "were not intended to impose financial obligations" upon the defendants. Although this finding reputedly is based upon plaintiff's testimony, there is not a single utterance by plaintiff which so much as suggests that the Notes were not intended to impose financial obligations. His testimony is directly contrary -- he urged repeatedly that after a 50% interest in Devco was denied him he expected defendants to pay him

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* The court referred to the defenses as "mostly irrelevant" (140a).

$50,000 as compensation for his services. To this defendants agreed -- the Notes (and Exhibit 5,137a) being the result.

However, appellant's primary point is more basic; namely, if a written, negotiable instrument is complete and unambiguous on its face, and if the trier of fact is unable to determine from the evidence presented what, if anything, is the unwritten intention of the parties; can the instrument be denied effect? Stated affirmatively: defendants have the burden of proof with respect to defenses. Levy v. Mindlin, 194 N.Y.S.2d 209, 21 Misc. 2d 938, 987 (Sup. N.Y. 1959). They argued that the Notes did not reflect the intention of the parties, but failed to make a record from which the trier of fact could determine any intention other than that shown by the documents. Therefore, they failed to carry their burden of proof, and the Notes should have been enforced in accordance with their terms.

Defendants' failure to carry their burden of proof is apparent from several statements in the opinion below; e.g., "None of the testimony made any sense at all", "...it was beyond the capacity of either of them [the parties] to express in language comprehensible to an ordinary mortal the fantasy world in which they were living." (146a). Following these clear statements of

its inability to determine the parties' true intention the district court nevertheless made findings concerning intention and awarded judgment for defendants on an unpleaded and unproved defense. This was error. The plaintiff cannot be denied the value of the Notes, for defendants have the burden of proof and failed to sustain it.

POINT II

NO EVIDENCE SHOULD HAVE BEEN TAKEN WITH RESPECT TO ANY ORAL AGREEMENT.

During his testimony at trial the defendant Edwards was asked to state the circumstances surrounding his execution of the Notes (60a). Under the guise of providing such an explanation, Edwards rambled on in several long answers setting forth a totally new and unique theory of his understanding of the Notes (60a-72a). Although (as the Court later found) Edwards' explanation was unclear and incredible, it also was inadmissible because it sought to prove a parol agreement between the parties that the Notes would be used to defraud a bank.

Although plaintiff testified that this was not his understanding (50a-53a,122a-124a), Edwards' shocking theory was that he and plaintiff had meant to defraud a bank (a potential lender) by showing completely valueless notes as "side collateral" for a loan to plaintiff (63a-64a, 79a-81a). Defendants had not pleaded any such oral

agreement to defraud (10a-11a).

The district court allowed this testimony of a parol agreement varying the terms of the written Notes.* Although Edwards was a totally incredible witness and the district court said it relied upon plaintiff's testimony only, the court nevertheless failed to enforce the Notes in accordance with their terms, and it must be inferred that the inadmissible parol played some part.

It is well settled law in New York, as elsewhere, that an alleged oral agreement varying the unconditional obligations of notes is not a defense. Manufacturers Trust Company v. Palmer, 13 A.D.2d 772, 215 N.Y.S.2d 840 (1st Dept. 1961); Ford v. Hahn, 269 App. Div. 436, 56 N.Y.S. 2d 854 (1st Dept. 1945); Jamestown Business College Ass'n. v. Allen, 172 N.Y. 291, 64 N.E. 952 (1902).

On cross-examination by defendants, and by the district court, plaintiff also testified to the intention of the parties in executing and delivering the Notes (50a-53a, 122a-124a). This testimony also should have been excluded. The district court incorrectly stated that this

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* A general objection to parol evidence was made at page 60 of the trial transcript and overruled. Unfortunately page 60 of the transcript is not part of the Appendix.

testimony was offered by plaintiff unnecessarily, and that plaintiff may have succeeded had he not insisted on so testifying. The record is clear, however, that the court itself solicited this testimony. (50a-53a, 122a-124a).

Nevertheless, unlike Edwards' testimony, that of plaintiff was credible, and the understanding of the parties as described by plaintiff is thoroughly consistent with his claim that the Notes are valid and enforceable. In essence, plaintiff said that if defendants had delivered to him 50 percent (50%) of the equity ownership of Devco before the Notes matured or were pledged as collateral for a personal borrowing, he would have returned the Notes. Even if proof of this condition subsequent were admissible, the condition was not satisfied. As of the date of presentment the Notes remained valid and enforceable.

POINT III

THE NOTES ARE SUPPORTED BY CONSIDERATION.

At trial the following interchange occurred:

> MR. DEVINE: Your Honor, I object. The only possible relevance of this line would be as to adequacy of consideration. That is not an issue in this case.
>
> MR. EDELSTEIN: It most assuredly is.

THE COURT: Consideration is consideration, it doesn't have to be adequate.

MR. EDELSTEIN: If it is completely out of line, it certainly is a matter for the Court.

THE COURT: I don't care how out of line it is. If it is consideration, it is consideration.

I don't know what was said in your law school, in my law school it was a Bullfinch. In Chicago I am told it's a Peppercorn. In any event, it doesn't have to be much.

Mr. Sinoto testified at length as to the services he had rendered for Devco and Mr. Edwards (33a-41a). Plaintiff's exhibit #5 is a letter to Mr. Sinoto signed by Mr. Edwards which states, "We are forwarding herewith four promissory notes, listed below, in consideration of your services rendered as executive advisor to Devco Management, Inc." (137a). Not only is this a true statement of fact; but also it is a binding and conclusive admission. At the conclusion of trial the judge stated his view, "not by way of decision", that:

"It doesn't seem to me that the issue of consideration is very material. Obviously this plaintiff did some work for the group of people that ultimately emerged as Devco. And if the corporation--and the corporation got some benefit from it or could be deemed or could have thought it had benefit from it. And therefore if the corporation wanted to issue an--to pay

for that benefit, I don't see that consideration is much in issue." (128a).

Finally, in its first opinion the district court characterized the defenses (presumably including the insistent defense of no consideration) as "mostly irrelevant" (140a).

Now, oddly, in its supplementary opinion, the district court has reversed field and, in the face of its earlier findings and substantial evidence to the contrary, reached the conclusion that consideration for the Notes is wanting. That conclusion is erroneous.

CONCLUSION

The district court's decision must be reversed and judgment must be granted for plaintiff because (1) the defendants have the burden of proof, and failed to prove any defense to plaintiff's *prima facie* case, (2) the parol agreement alleged by defendants cannot, as a matter of law, be considered; and (3) there is consideration for the Notes.

Respectfully submitted,

SCHWENKE & DEVINE

Of Counsel:

MICHAEL C. DEVINE
S. PITKIN MARSHALL

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Brief.

IS HEREBY ADMITTED.

DATED: Oct. 2, 1975.

Frances Fruchtman for
Marvin D. Edelstein

Attorney for Appellees